Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIEF FOR APPELLANTS

PATRICK A. KEENAN
DePaul Law Clinic
23 East Jackson Boulevard
Chicago, Illinois 60604
(312) 321-7751

Attorney for Plaintiffs-Appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION OF THIS COURT	2
QUESTIONS PRESENTED	3
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. THE ILLINOIS FOSTER PAYMENT SCHEME DENIES FEDERAL FOSTER CARE PAYMENTS TO CHILDREN WHO ARE PLACED IN APPROVED FOSTER HOMES MAINTAINED BY RELATIVES. THIS DENIAL VIOLATES THE SOCIAL SECURITY ACT, 42 U.S.C. §§601, 608 AND THE SUPREMACY CLAUSE, U.S. CONSTITUTION ARTICLE VI, SECTION 2	18
A. The plain meaning of the Act is that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of the payments violates the Act	20
B. The established position of H.E.W. is that the Social Security Act and Regulations require that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of the payments violates the Act	25
C. The legislative history and overall purpose of the Social Security Act make Plaintiffs eligible for full AFDC-FC payments; denial of the payments violates the Act	31

Page

II. THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. THIS CLASSIFICATION VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE 38

A. This Court should follow its recent jurisprudence and give close scrutiny to: 1) the character of the classification; 2) the nature of the personal interest infringed, and 3) the nature of the state interest advanced by Illinois' discriminatory foster care payment scheme. On balance, the scheme is unconstitutional 40

B. The Illinois foster care payment scheme which denies AFDC-FC payments to children who are in the best placement, in approved foster homes maintained by their relatives, is not rationally related to any legitimate state interest 46

CONCLUSION 49

SUPPLEMENT S-1

TABLE OF AUTHORITIES

Cases:

Banks v. Chicago Grain Trimmers, 390 U.S. 459, 88 S. Ct. 1140 (1968) 25

Page

Burns v. Alcala, 95 S. Ct. 1180 (5/17/75) 19, 24, 25

Carleson v. Remillard, 404 U.S. 598, 92 S. Ct. 1932 (1972) ..... *passim*

Clampett v. Madigan, No. Civ. 73-4018 D.S. Dak. (So. Div. 5/24/73) 19, 31

Dandridge v. Williams, 398 U.S. 471 (1970) 90 S. Ct. 1153 24

Davis v. Richardson, 409 U.S. 1069 (1972) 93 S. Ct. 678 41

Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1025 (1972) 46

Frontiero v. Richardson, 411 U.S. 677 93 S. Ct. 1764 (1973) 46

Gomez v. Perez, 409 U.S. 535 (1972) 93 S. Ct. 872 41

Griffin v. Richardson, 409 U.S. 1069, 93 S. Ct. 689 (1972) 41

Jackson v. Ohio Department of Public Welfare, No. C72-182 N.D. Ohio (4/17/72) 19

Jiminez v. Weinberger, 417 U.S. 628 (1974) 417 U.S. 628 ..... 41, 44, 45

Kahn v. Shevin, 416 U.S. 351 (1974) 94 S. Ct. 1734 43

King v. Smith, 392 U.S. 309, 88 S. Ct. 2128 (1968) ... *passim*

Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968) 41, 42

Lewis v. Martin, 397 U.S. 552, 90 S. Ct. 1282 (1970) ... 18, 26

Minor v. Mechanics Bank, 26 U.S. 46 (1828) 25

Morey v. Doud, 354 U.S. 457, 77 S. Ct. 1344 (1953) 43, 47

New Jersey Rights Welfare Organization v. Cahill, 411 U.S. 619, 93 S. Ct. 1700 (1973) 41

	Page
Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd 400 U.S. 1003, 91 S. Ct. 572 (1971)	13, 14, 35
Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251 (1971)	45
Rosado v. Wyman, 397 U.S. 397, 90 S. Ct. 120 (1970)	19
Shea v. Vialpando, 416 U.S. 251, 94 S. Ct. 1746 (1974)	22
Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161 (1944)	25
Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972)	42
Townsend v. Swank, 404 U.S. 282, 92 S. Ct. 502 (1972)	*passim*
U.S. v. Pennsylvania Chemical Co., 411 U.S. 655, 93 S. Ct. 1804 (1973)	25
U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 93 S. Ct. 2821 (1973)	46
Van Lare v. Hurley, 43 USLW 4502 (5/19/75)	18, 19
Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S. Ct. 1400 (1972)	41, 44
Weinberger v. Weisenfeld, 95 S. Ct. 1225 (1975)	43, 45
Williams v. Wohlgemuth, 366 F. Supp. 541 (W.D. Pa. 1973) aff'd 94 S. Ct. 1604 (1974)	47
Statutes and Regulations:	
28 U.S.C. § 1253	2
28 U.S.C. § 1343(3)(4)	2
28 U.S.C. § 2281, § 2284	2
42 U.S.C. § 601	*passim*
42 U.S.C. § 602	*passim*
42 U.S.C. § 603	5, 6, 13
42 U.S.C. § 606	*passim*

	Page
42 U.S.C. § 607(a)	10
42 U.S.C. § 608	*passim*
42 U.S.C. § 625	6, 32, 34
42 U.S.C. § 1983	2, 12
45 C.F.R. § 233.10	6, 23
45 C.F.R. § 233.110	6, 7
Ill. Rev. Stats., Ch. 23 § 2-11 (1971)	4, 11, 38
Ill. Rev. Stats., Ch. 23 § 4-1.2 (1971)	5, 29
Ill. Rev. Stats., Ch. 23 § 2212.05 (1971)	4, 21, 29
Ill. Rev. Stats., Ch. 23 § 2212.17 (1971)	4, 21, 29
Ill. Rev. Stats., Ch. 23 § 5001 (1971)	4, 29
Ill. Rev. Stats., Ch. 23 § 5005 (1971)	4, 45
Ill. Rev. Stats., Ch. 37 § 701-2(1) (1971)	11, 45
Legislative History:	
Sen. Rep. No. 628, 74th Cong. 16, 17 and 34-36 (1935)	32
Sen. Rep. No. 1589, 87th Cong. 2nd Sess. 1962 U.S. Cong. & Adm. News V.1. 1959	35
Sen. Rep. No. 165, 87th Cong. 1st Sess. 1961 U.S. Cong. & Adm. News V.2. 1721,1722	32, 33
Sen. Rep. No. 744, 90th Cong. 1st Sess. 1967 U.S. Cong. & Adm. News V.2. 3000-3002	35
Miscellaneous:	
Gunther, "Model for a Newer Equal Protection," 86 Harv. L. R. 1 (1972)	39
Memorandum of United States as *amicus curiae* –filed herein 2/19/75	26
H.E.W. Program Instruction, APA-PI-75-9	27
Ill. DCFS Placement Manual	5

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-6935

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Plaintiffs-Appellants,

v.

JEROME MILLER individually and as Director of the DEPARTMENT OF CHILDREN AND FAMILY SERVICES and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is

officially reported at 374 F. Supp. 1204 (1974). It is also reproduced in the Appendix 50-61.

JURISDICTION

This is a direct appeal to this Court pursuant to 28 U.S.C. § 1253 from the final decision of the three-judge United States District Court for the Northern District of Illinois, Eastern Division, which was convened in compliance with 28 U.S.C. § § 2281, 2284.

The court below had jurisdiction pursuant to 28 U.S.C. § 1343(3)(4) and 42 U.S.C. § 1983, in a suit to enjoin the operation of that part of the Illinois statutory foster care scheme which denies foster care payments to Appellant foster parents and foster children for the sole reason that they are related to one another while all the foster children who live with strangers automatically get the full subsidy.

The action was filed on March 13, 1973. On cross motions for summary judgment the District Court decided on February 28, 1974: first, the cause was properly maintained as a class action. Second, the Eleventh Amendment did not bar the suit. Third, the Illinois foster care scheme did not violate the Equal Protection Clause or the Social Security Act. The court entered summary judgment for defendants without a trial. *Youakim v. Miller*, 374 F. Supp. 1204. Plaintiffs-Appellants appeal only the third part of the February 28, 1974 decision.

The Notice of Appeal was filed on April 23, 1974.

In February 1975, pursuant to the Supreme Court's order of October 15, 1974, the Solicitor General filed a

brief in support of the Court's jurisdiction and in support of Appellants' contention that the Illinois scheme violates the Social Security Act.

On March 17, 1975 the Supreme Court noted probable jurisdiction and granted Plaintiffs' motion to proceed *in forma pauperis*.

QUESTIONS PRESENTED

I. THE ILLINOIS FOSTER PAYMENT SCHEME DENIES FEDERAL FOSTER CARE PAYMENTS TO CHILDREN WHO ARE PLACED IN APPROVED FOSTER HOMES MAINTAINED BY RELATIVES. DOES THIS DENIAL VIOLATE THE SOCIAL SECURITY ACT, 42 U.S.C. § § 601, 608 AND THE SUPREMACY CLAUSE, U.S. CONSTITUTION, ARTICLE VI, SECTION 2?

II. THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. DOES THIS CLASSIFICATION VIOLATE THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE?

STATUTES AND REGULATIONS INVOLVED

I. State Statutes and Regulations

The state statutes challenged provide for full foster care payments to wards of the state—foster children—

who are placed in licensed foster homes maintained by strangers. But the same statutes deny these payments to children placed in approved foster homes maintained by persons who happen to be related to them. Ill. Rev. Stats., Ch. 23 § 2212.05 and § 2212.17 (1971), provide in relevant part:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care or placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services Act. Ill. Rev. Stats., Ch. 23, § 2212.05 (1971). [Text: App. 21].
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, . . . Ch. 23, § 2212.17 [Text: App. 21, 22]. (emphasis added)

The general powers and duties of the Illinois Department of Children and Family Services (DCFS) and its Director, Defendant-Appellee Jerome G. Miller, are set out in Ill. Rev. Stats., Ch. 23, § 5001 and § 5005 (1971). The Department was created to provide social services to children and their families (§ 5001).

> The Department shall establish and maintain tax-supported child welfare services and extend and seek to improve voluntary services throughout the state, to the end that services and care shall be available on an equal basis throughout the state to children requiring such services (§ 5005, ¶ 5) [Text: App. 23-29].

Under Illinois law the only persons who have a legal duty to support their relatives are natural and adoptive parents. Ill. Rev. Stats., Ch. 23 § 2-11 (1971). [Text: Supp.S-1].

Section 4-1.2 of the Illinois Welfare Code provides for payment for foster care. Ill. Rev. Stats., Ch. 23 § 4-1.2 (1971). [Text: Supp.S-1].

Certain DCFS regulations are concerned with foster home licensing and payment. See Illinois DCFS *Placement Manual* Ch. 3, § 5, at p.97. These regulations contain the statement: "The Department [of Children and Family Services] has no statutory authority to pay relatives for the care of children." [Text: App. 34-37 at 36].

In its Memorandum of Decision, the District Court correctly observed that these regulations did no more than summarize what is apparent on the face of the statutes. 374 F. Supp. at 1205, note 1. The District Court accordingly addressed itself only to the challenged statutes.

II. Federal Constitution, Statutes and Regulations

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Not challenged, but relevant to this case is Title IV of the Social Security Act, 42 U.S.C. §§ 601, 602, 603(2)(1)(B)(ii), 606, and 608.

Section 401, 42 U.S.C. § 601, mandates a clear national policy of encouraging the care of dependent children in their own homes or in the homes of relatives whenever possible. All Federally supported child welfare plans must be designed to help maintain and strengthen family life, and to help such parents or relatives. [Text: App. 28, 29].

Section 402, 42 U.S.C. 602 sets out the requirements for state welfare plans, including that each state provide for aid to families with dependent children in the form of foster care. § 602(a)(20). [Partial Text: Supp.S-2].

Section 403(a)(1)(B)(ii), 42 U.S.C. § 603, states the formula for computing the Federal share of assistance payments for foster families. [Partial Text: Supp.S-2].

Section 406, 42 U.S.C. § 606 defines those persons eligible for benefits under Title IV of the S.S.A. [Text: Supp. S-2, S-3].

Section 408, 42 U.S.C. § 608 is the blueprint for the federal foster care program. It provides for federal funds to be paid to children cared for "in the foster family home of *any individual.*" 42 U.S.C. § 608(b)(1). (emphasis added.) There are no exclusions. [Text: App. 31].

Section 425, 42 U.S.C. § 625 defines federally subsidized "child welfare services" as:

> public social services which supplement, or substitute for, parental care and supervision for the purpose of . . .
>
> (4) Otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible, or where needed, the provision of adequate care of children away from their homes in foster family homes or day care or other child-care facilities.
>
> [Text: App. 28-29].

Also not challenged but involved in this case are 45 C.F.R. § § 233.10 and 233.110.

Section 233.10 sets out general provisions regarding coverage and conditions of eligibility in financial assistance programs. It requires that "groups selected

for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." [Text: Supp.S-5].

Section 233.110 sets out certain Regulations pertaining to the Federal AFDC-FC program. [Text: Supp.S-7].

Most relevant to this case is a recent H.E.W. Program Instruction to all state agencies which administer state welfare plans, including AFDC-FC programs. APA-PI-75-9. October 25, 1974. [Reproduced in Part I - B *infra.*]

STATEMENT OF THE CASE

In May 1969 the juvenile court in Cook County, Illinois, found that the four minor Plaintiffs could not be cared for in their own home. They were declared wards of the State of Illinois, and the Illinois Department of Children and Family Services (DCFS) and its Director, Dr. Jerome Miller, Defendants-Appellees, were appointed their guardian. DCFS placed the children in various licensed foster care institutions. At that time all the children lived with strangers and received full federally subsidized foster care payments under the state's Aid to Families with Dependent Children–Foster Care (AFDC-FC) program. 42 U.S.C. § 608.

In January 1972, Plaintiff-Appellant Timothy Robertson, age 8, experienced some problems in the stranger's

home where he then lived. Defendant Miller or others in DCFS decided that Timothy's best interest would be served by removing him to a new foster placement in the home of his adult sister, Linda, and her husband, Marcel Youakim, who were willing to accept him as their foster child. DCFS accordingly inspected the Youakims' home, found that it complied with all the standards for a licensed foster home, gave its approval, and Timothy became the Youakims' foster child.

DCFS requires that all foster parents sign a contract, the Illinois Foster Home Placement Agreement, which spells out the obligations of the foster parents to children placed with them. The Youakims did sign such an Agreement, but on their copy the word "Foster" and the sections which provide for AFDC-FC payments were crossed out. [Ex. I to Complaint. App. 18-20] The Youakims' obligations as foster parents are identical to those of all other foster parents.

The DCFS placement worker then told them that they would not receive regular foster care payments on Timothy's behalf. When the Youakims asked the reason why Timothy's foster care payments were terminated, the caseworker explained that Illinois law and policy deny foster care payments to children who are placed in the homes of foster parents related to them. Timothy still moved into the Youakims' home, where he remains today.

In May 1972, DCFS removed Timothy's sister, Plaintiff-Appellant Mary Lou Robertson, age 10, from the home of the strangers with whom she was then placed, and the Youakims likewise accepted her for foster care. Because of frequent moves Mary Lou had been considered a problem child, but since placement

with their related foster parents both Mary Lou and Timothy have been and remain happy and well adjusted.

When DCFS and its Director, duty-bound to act in the best interests of their wards, removed Timothy and Mary Lou from the foster homes operated by strangers and placed them in the approved foster home of their sister and her husband, which is, in fact and by law the best possible placement [Complaint ¶¶25-27. App. 11], Defendants-Appellees terminated the foster care (AFDC-FC) subsidy payments. They claim the law dictates the cutoff.

Thereafter the Youakims learned that they could apply for regular AFDC payments for their foster children, as can any person who takes in an indigent relative. For some time Timothy and Mary Lou received about $63.00 per month in regular AFDC funds. When they lived with strangers they each received about $105.00 per month from the state's AFDC-FC program.[1]

The benefits were cut off only when they were placed in the best possible home. The cutoff was

[1] In their affidavits in support of their motion for summary judgment, Defendants alleged that there are occasional exceptions to the general policy whereby the DCFS may allow larger payments to children living with foster parents related to them. In the case of these exceptions, they say that monthly payments in excess of the regular AFDC rate ($63.00) up to a maximum equal to the full foster care rate ($105.00) may be available if the related foster *parents* can demonstrate sufficient need. About 140 children are designated exceptions [App. 42-44]. There are no rules for the administration of these exceptions to policy, nor are there standards to determine "need." Members of the class Plaintiffs-Appellants represent are not generally aware that these occasional "exceptions to policy" are available.

automatic and unrelated to need. The amount of payment to each foster child under the state's AFDC-FC program is uniform regardless of the financial status of the foster home. The $63.00 AFDC payment Plaintiffs received was not conditioned on their status as foster children or state wards, which the regular AFDC program does not recognize. That program considers them to be just indigent children who happen to be living with relatives. 42 U.S.C. § 607(a). Illinois as a general policy excludes otherwise eligible wards of the state–foster children–from the AFDC-FC program if they are placed with relatives.

Since they undertook to care for their foster children, Marcel and Linda Youakim have incurred great personal expense and debt. They fear they will not long be able to continue paying to help support their foster children, whom the state alone is duty-bound to support. They have gone through a complex, difficult, embarrassing and stigmatizing process of application for straight AFDC funds. They experienced difficulties in getting the regular $63.00 AFDC payments for their foster children. [Complaint: ¶¶28, 29, 30, 33. App. 12]

The Youakims and all of the named Plaintiffs-Appellants believe that the best interests of all four children would be served if they could all live together in a family setting. The state's refusal to grant foster care payments makes this impossible. Sherry Robertson, age 15, continues to live with unrelated foster parents, where she receives the full foster care subsidy of $105.00 per month. Larry Robertson, age 13, remains in an orphanage, at an institutional cost far greater than the full foster care rate of $105.00 per month. [Complaint: ¶30. App. 12].

In order to participate in the federal public assistance programs, Illinois must submit a State Welfare Plan to the U.S. Department of Health, Education and Welfare. Its plan must conform to the requirements of Section 402 of the Social Security Act, 42 U.S.C. §602 [Supp. S-2], and must include descriptions of all of the types of programs a state must provide. The foster care program (AFDC-FC) is one such program.

Of the $105.00 per month Illinois normally pays foster parents for the care of the state wards placed with them, Plaintiffs believe that one half or more is paid by the federal government. The state may pay the federal foster care program funds (AFDC-FC) to *any individual* whose home is approved and who accepts a state ward–foster child–for care. 42 U.S.C. §608(b).

Illinois, like many states, has a chronic shortage of foster homes. Of Defendants-Appellees' twenty-thousand-plus wards only about 1500 are placed in the approved foster homes maintained by their relatives. The rest live in the homes of strangers or in institutions.

In Illinois only natural or adoptive parents are responsible for the support of children. Ill. Rev. Stats., Ch. 23 §2-11 (1971). [Supp.S-1] Once the court declares a child to be a ward of the state, it must act in his best interests. Ill. Rev. Stats., Ch. 37 §701 ff. (1971) [App. 27, 30]. The child has a right to full state support adequate to meet his needs and at a level equal to that of all other state wards. The state can look to no other relatives to support the children.

Appellants allege that the bar to payment of AFDC-FC funds to children living with foster parents related to them is an attempt by Illinois to engraft an

additional eligibility criterion onto the federal scheme. The imposition of this additional criterion has the effect of separating children from their relatives. Illinois' scheme does not put its foster children back together with their families; it pulls them apart.

Illinois should make foster care payments to its wards living with related foster parents, as the federal law requires. Appellants have alleged that many more of the state's children would be living with their relatives if the payments they seek were available. Some children who are now institutionalized and labeled "hard to place" would be removed from institutional care to the homes of their relatives.

Plaintiffs brought a civil rights class action under 42 U.S.C. §1983 in the U.S. District Court for the Northern District of Illinois. They alleged the Illinois scheme violates equal protection and supremacy. A three-judge court was convened.

On cross motions and affidavits for summary judgment the District Court decided on February 28, 1974 that: First, the action could be maintained as a class. Second, the Eleventh Amendment did not bar the suit. Third, the Illinois foster care scheme, though concededly discriminatory, did not violate the Equal Protection Clause or the Social Security Act, and accordingly the suit to enjoin the operation of the statute was dismissed without trial. The Plaintiffs appeal only the third part of the February 28, 1974 decision.

The District Court disposed of the supremacy claim with its observation that

> Far from being inconsistent with the federal scheme, the Illinois scheme in general seems to parallel it. The federal statute authorizes aid to the

> natural parents and relatives of dependent children in one section, 43 U.S.C. §606, and aid to foster children in another, 42 U.S.C. §608. Additionally, more money is allocated under the federal plan to foster care payments than to regular ADFC payments. 42 U.S.C. §603(a)(1)(B); see *Ramos v. Montgomery, supra,* 313 F. Supp. at 1182. Thus the federal statute makes the same classification as the Illinois statute.
>
> *Youakim v. Miller,* 374 F. Supp. 1204 at 1210 [App. 59-60].

The District Court erred in its determination that the Social Security Act makes "foster parents" and "relatives" mutually exclusive categories. [See Part I *infra.*]

The lower court gave little attention to what is central to the case: the problem of the difference between the AFDC-FC payment of $105.00 and the regular AFDC payment (which was not designed for children in foster care) of $63.00 per month. Throughout its opinion, the District Court was more concerned with the rights and economic interests of the foster *parents,* than with the foster children.

All the state's foster children have equal needs, equal claims to state support, the right to live with their relatives whenever possible, and the expectation that the state will act in their best interests. The District Court recognized the possibility of the violation of this right, but did not frame a remedy:

> Some related foster parents may not be able to afford the responsibility of caring for additional children, but the state argues that the scheme was not enacted to alleviate this problem, and from the fact that payments are not based on the relative

wealth of the foster parents, this contention is borne out.

Id. at 1208 [App. 56,57]

The District Court then in a footnote added its opinion that the possibility of foster children being kept apart from their relatives was lessened by the availability of the regular, much smaller AFDC payments. *Id.* at 1208 [App. 56]. But no evidence was taken.

The lower court relied on the case of *Ramos v. Montgomery*, 313 F. Supp. 1179 (S.D.Cal. 1970), aff'd 400 U.S. 1003, 91 S. Ct. 572 (1971), to dispose of the equal protection claim. The District Court would take the. legal duty of *parents* to make sacrifices for their children and make it a binding moral duty of non-responsible relatives. The difference between the $105.00 and $63.00 would be subsidized by relatives who felt a moral duty to undertake the state's obligation. *Id.* at 1209, [App. 57-58].

As the case involves an important question of interpretation of the Social Security Act, the Supreme Court on October 15, 1974 ordered the Solicitor General to file an *amicus* brief. 95 S. Ct. 36. In his February 1975 brief, the Solicitor, on behalf of the United States and H.E.W., argued that Illinois' scheme violates the Social Security Act and urged the Court to take jurisdiction and reverse.

The Court noted probable jurisdiction on March 17, 1975. 95 S. Ct. 1389. Plaintiffs-Appellants respectfully file this brief on May 31, 1975. They respectfully urge the Court to reverse the District Court's decision and to remand the case with instructions to enter summary

judgment for Plaintiffs, or in the alternative, to enter a proper discovery order and set the case for trial.

SUMMARY OF ARGUMENT

I. The Illinois practice of paying some of its foster children the full, federally subsidized foster care payment while it denies the payments to its otherwise eligible foster children who live with foster parents related to them violates the Social Security Act and Supremacy Clause.

The definition of foster family home that appears in the Illinois Statute differs from that of the Social Security Act in that it adds the term "unrelated" to the definition of operators of foster homes. Illinois thus denies full federally subsidized foster care payments to children placed in approved foster homes maintained by relatives.

The Social Security Act is the supreme law of the land. The states which participate in federal categorical assistance programs have great discretion to define level of payment and standard of need. But the federal law defines eligibility. The state cannot exclude a group of persons who are eligible according to the federal law.

Plaintiffs-Appellants, who are foster children placed in a State-approved foster home maintained by their adult sister and her husband, are eligible under the federal law but barred by the Illinois law and policy.

A. The plain meaning of the Social Security Act indicates that the Plaintiffs-Appellants are eligible for AFDC-FC payments. Absent a clear indication in the Act itself or in the legislative history which indicates it

was the intent of Congress to allow the States to restrict federally defined eligibility the plain meaning of the statute must be given effect.

B. H.E.W. has taken the same position as Plaintiffs. The Solicitor General filed a brief in this case wherein he argued for reversal on behalf of H.E.W. In October 1974, H.E.W. issued a Program Instruction to all state welfare agencies wherein it specifically directed that children who are placed with related foster parents are to receive full AFDC-FC payments.

C. The legislative history and overall purpose of the Social Security Act indicate that Congress intended the foster care payments to be made to relatives. Illinois' denial of the payments is contrary to the overall purpose of the Act, which is to strengthen family life. Illinois' practice does not put families back together. It pulls them apart.

The District Court erred in its finding that the Illinois foster care payment scheme does not violate the Social Security Act. The state law is not served by the possible availability of much lower regular AFDC payments from a different fund.

II. The Illinois practice of denying payment to some of its foster children violates equal protection. It creates a sub-group of foster children who suffer invidious discrimination.

A. The Court should analyze the Illinois statute in the same way it has considered several recent equal protection challenges where personal rights or interests are involved. The Court should consider the characteristics of the class of children invidiously discriminated against, and the weighty and important interest of the children in maintaining and strengthening whatever

family associations they have, and it should balance them against the overall legitimate state interests advanced. Here the purported state interest is slight or nonexistent. In fact the effect of the scheme is contrary to the overall state interest in strengthening families. The Court should give close scrutiny and find the scheme violates equal protection.

B. The District Court erred in its application of the "minimum scrutiny" test to the Illinois law. The classification that children who live in state-approved foster homes operated by their relatives are ineligible for payments is not rationally related to any legitimate state interest. The overall state interest is to service and strengthen *families.* But the Illinois scheme pays a premium for placement with strangers. It is irrational, contrary to the legislative purpose, and violates equal protection.

The Court should reverse and enter summary judgment for Plaintiffs.

ARGUMENT

I.

THE ILLINOIS FOSTER PAYMENT SCHEME DENIES FEDERAL FOSTER CARE PAYMENTS TO CHILDREN WHO ARE PLACED IN APPROVED FOSTER HOMES MAINTAINED BY RELATIVES. THIS DENIAL VIOLATES THE SOCIAL SECURITY ACT, 42 U.S.C. §§601, 608 AND THE SUPREMACY CLAUSE, U.S. CONSTITUTION ARTICLE VI, SECTION 2.

Introduction

The Constitution and laws of the United States are the supreme law of the land. All states are bound by them. States may not enact or execute laws or regulations which are contrary to the federal law and the policies therein stated.

In the area of federally subsidized categorical assistance benefits the Social Security Act is supreme. As a condition of its participation in the federal funding, each state must comply with the requirements of the Act and regulations. *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128 (1968); *Lewis v. Martin*, 397 U.S. 552, 90 S. Ct. 1282 (1970); *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502 (1971); *Carleson v. Remillard*, 406 U.S. 598, 92 S. Ct. 1932 (1972); *VanLare v. Hurley*, 43 USLW 4502 (May 19, 1975).

In each of these cases the state attempted to limit eligibility by defining a term in a manner inconsistent with the federal law. An Alabama law attempted to include "substitute father" in the federal definition of

"parent." *King v. Smith*, supra. An Illinois law attempted to exclude colleges and universities from the federal definition of "institutions of higher education." *Townsend v. Swank, supra.* A California law attempted to exclude military service from the definition of "continued absence from the home." *Carleson v. Remillard, supra.* A New York law attempted to include the unproved but presumed contribution of a lodger in the definition of available income. *VanLare v. Hurley*, 43 USLW 4502 (May 19, 1975). And see *Rosado v. Wyman*, 397 U.S. 397, 90 S. Ct. 120 (1970).

The Illinois law attempts to exclude relatives from the definition of foster parents. This Court must correct the error just as it did in the other cases, and just as other federal courts have corrected similar attempts by other states which deny eligibility to a sub-group of foster children. *Clampett v. Madigan*, No. Civ. 73-4018 D. S. Dak. So. Div. (May 24, 1973). [Memorandum Decision attached: Supp. S-8]. *Jackson v. Ohio Department of Public Welfare*, No. C72-182 N.D. Ohio, (April 17, 1972).

In *Burns v. Alcala*, 95 S. Ct. 1180 (March 17, 1975), this Court declared the law applicable to all these cases:

> *King*, *Townsend*, and *Carleson* establish only that once the federal standard of eligibility is defined, a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional.
>
> at 1184

The federal laws and regulations which set up the foster care program define and create a protected class of all children who have been removed from their

regular AFDC-homes by the juvenile court and who are thereafter placed in licensed or approved foster homes. 42 U.S.C. §608. The fact that some may be placed with foster parents who are related to them does not affect their eligibility.

To determine whether a state law or policy complies with or violates the Social Security Act, this Court traditionally looks to three sources:

A. The plain words and meaning of the Act.
B. The interpretation and advice of the Department of Health, Education and Welfare.
C. The legislative history and the overall purpose of the Act.

A. The plain meaning of the Act is that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of thé payments violates the Act.

Section 408 of the Social Security Act, 42 U.S.C. §608 [App. 31-33], is the federal blueprint for the states' foster care programs. It contains concise definitions.

The last paragraph of Section 408 reads:

> For purposes of this section, the term "foster family home" means *a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing* homes of this type as meeting the standards established for such licensing; and the term "child-care institution" means a nonprofit private child-care institution which is licensed by the State in which it is

> situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing.
>
> (emphasis added)

Illinois defines the same terms differently in the statutes challenged in this action:

> "Facility for child care" or "child care facility" means any person, . . . who or which receives or arranges for care or placement of one or more children, *unrelated* to the operator of the facility. Dept. of Children and Family Services. Ill. Rev. Stats., Ch. 23, §2212.05 (1971).
>
> and
>
> "Foster family home" means a facility for child care in residences of families who receive no more than 8 children *unrelated* to them, . . . Ch. 23, §2212.17 (emphasis added)
>
> [Text: App. 21, 22]

The conclusion is inescapable. By inserting the words "unrelated to the operator of the facility" in its definition of the homes wherein eligible foster children can be placed, Illinois has engrafted an additional condition of eligibility onto the federal scheme. This attempt must meet with the same fate as the states' similar attempts in *Townsend, King, Carleson, supra.*

The Social Security Act does not authorize the Illinois exclusion of related foster homes.

Section 408, 42 U.S.C. §608, defines the homes in which state wards may receive federally subsidized foster care:

> 608(b) the term "aid to families with dependent children" shall . . . include also foster care in behalf

of a child described in paragraph (a) of this section–

(1) in the foster family home *of any individual*, whether the payment therefor is made to such individual or to a public or nonprofit private child-placement or child-care agency, . . .

(emphasis added)

No homes are excluded.[2] No other options are offered. The word "unrelated" appears nowhere in the federal definition.

Unlike other sections of the Act, where Congress specifically sought to exclude or include certain relatives other than parents from eligibility, (or to give the states the option to provide more limited coverage than the language of the Act) Section 408 permits payment to *any* approved foster home where the child

[2]This Court has made clearer what would seem already clear: when Congress writes "any" the word means literally "any"–i.e. an inclusive term which cannot be whittled down by the states. In *Shea v. Vialpando*, 416 U.S. 251, 94 S. Ct. 1746 (1974), the Court construed section 402(a)(7), 42 U.S.C. § 602, which reads:

" . . . as well as *any expenses* reasonably attributable to the earning of any such income. . ."

This Court said:

By its terms, § 402(a)(7) requires the consideration of "any" reasonable work expenses in determining eligibility for AFDC assistance. In light of the evolution of the statute and the normal meaning of the term "any," we read this language as a congressional directive that no limitation, apart from that of reasonableness, may be placed upon the recognition of expenses attributable to the earning of income at 1753.

Illinois must propose a tortured reading indeed in order to say that the term "any individual" excludes "any individual related to the child."

who is otherwise eligible (i.e. a court-declared ward of the state) can be placed.[3]

The Department of Health, Education and Welfare recently amended its regulations to comply with the law of the *King*, *Townsend* and *Carleson* cases, *supra*. The regulations, amended in July 1974, now narrowly and precisely define the times when a state plan may exclude groups of citizens from federal categorical assistance programs:

§233.10 General provisions regarding coverage and eligibility.

(a) State plan requirements.
A state plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A state shall impose each condition of eligibility required by the Social Security Act; and

(ii) A state may:

(A) Provide more limited public assistance coverage than that provided by the Act *only where the*

[3]In Illinois, related foster family homes are "approved" while non-related foster homes are "licensed." Both licensed and approved homes must meet the same standards.

Social Security Act or its legislative history authorizes more limited coverage: . . .

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the state. . .

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

(emphasis added) [Text: S -5].

The underlined section is another statement of this Court's holding in *Burns v. Alcala, supra.* Unless the Defendants can show where the plain words or legislative history of the Social Security Act specifically authorizes the denial of AFDC-FC payments to the children in the Plaintiff class, all of whom are otherwise eligible, the scheme must fail.

There is no doubt that

[s]tates have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the *level* of benefits by the amount of funds it devotes to the program.

Dandridge v. Williams 397 U.S. 471 at 478 (1970) quoting *King v. Smith, supra.* (emphasis added).

But a state's discretion is limited to setting the *level* of benefits and the standard of need. Federal law defines *eligibility*. The state cannot deny assistance to persons, like Plaintiffs, whom the federal law defines as eligible to receive it. 42 U.S.C. § 608. *King v. Smith, Townsend*

v. Swank, Carleson v. Remillard, Burns v. Alcala, Van Lare v. Hurley, supra. In the absence of persuasive reasons to the contrary, the plain meaning of the statute must be followed. *Banks v. Chicago Grain Trimmers,* 390 U.S. 459 at 465, 88 S. Ct. 1140 (1968).

The plain meaning of the Social Security Act is that the state must make full AFDC-FC payments to children placed in approved foster homes maintained by their relatives. Unless following the ordinary meaning of the term "any individual" would manifestly defeat the object of the law, it must be presumed that Congress intended just what it said. See *Minor v. Mechanics Bank,* 26 U.S. 46, 64 (1828). Here, the ordinary meaning of the term manifestly *advances* the object of the law: it enables the state to secure high quality foster care and preserve and strengthen the family associations of the foster children.

B. The established position of H.E.W. is that the Social Security Act and Regulations require that children placed in approved foster homes maintained by their relatives are eligible for full AFDC-FC payments; denial of the payments violates the Act.

This Court has traditionally considered that the

rulings, interpretations and opinions of the agency responsible for the administration of the Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Skidmore v. Swift & Co., 323 U.S. 134, 140 65 S. Ct. 161 (1944). *U.S. v. Pennsylvania Chemical Co.* 411 U.S. 655, 674, 93 S. Ct. 1804 (1973)

In questions of the interpretation of the Social Security Act, the Court gives certain deference to the position of the administrators in the Department of Health, Education and Welfare. *Lewis v. Martin*, 397 U.S. 552, 559, 90 S. Ct. 1282, (1970). The position of the Department of H.E.W. represents a national perspective and a continuing effort to secure uniformity and consistency in the administration of the Act.

H.E.W. has repeatedly urged the same position advanced by Plaintiffs-Appellants.

Most recently and most graphically, in an *amicus* memorandum filed in this case on February 19, 1975, the Solicitor General argued on behalf of H.E.W.:

> We submit that the Illinois policy of denying foster care AFDC benefits for children living with relatives is invalid because it conflicts with specific criteria for eligibility set forth in the Social Security Act; . . .
>
> *Amicus Memorandum* 2

and

> [T]he only qualification for foster-care benefits is that the child be "dependent" and that it be living in a foster home or a child-care institution as the result of a judicial determination that its own home is unsuitable. Those conditions were satisfied here, and the child is therefore entitled to foster-care benefits.
>
> *Id.* at 5

The argument by the Solicitor is a restatement of the H.E.W.'s position that the Act requires payment of full AFDC-FC funds to foster children placed in the homes of their relatives. In fact the Department recently issued a direct instruction to all the state welfare agencies,

including the Defendant-Appellee DCFS, that full AFDC-FC funds must be paid to children in approved foster homes maintained by relatives.

Because it is unequivocal, and may resolve this controversy, the Program Instruction is here set out in its entirety.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

PROGRAM INSTRUCTION
APA-PI-75-9
October 25, 1974

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

SUBJECT: AFDC Foster Care

COMMENT: This program instruction is issued to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes even though suitable foster care could be provided in the homes and payments made at the foster care rate when children are placed with relatives who meet all conditions of eligibility for AFDC-FC.

There have been several U.S. District Court decisions which have held that States may not refuse to provide the foster care rate to a foster home because it is operated by relatives who have no

legal responsibility for support and care of the child.

In addition, the U.S. Supreme Court in the case of *Ramos v. Montgomery*, January 18, 1971, upheld making a higher payment for foster care than was provided under a state's standard for AFDC payments.

Under 45 CFR 233.110(a)(1), states must provide for aid in the form of foster care for each otherwise eligible child as specified in the Act and in 233.110(b). Federal financial participation is available for children who are placed in a foster home or nonprofit private child-care institutions licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State. These provisions apply regardless of whether the licensed or approved foster family home in which a child is placed is operated by a relative (with no legal responsibility to support the child).

When a child has been removed from his home by judicial determination and is placed in foster care under the various conditions specified in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative. A non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a foster care payment. It must be noted, too, that the

1967 amendments to the Social Security Act liberalized Federal financial participation in the cost of foster care, recognizing foster family care is more costly than care in the child's own home.

INQUIRIES TO:
SRS Regional Commissioners

/s/John A. Svahn
JOHN A. SVAHN
Commissioner
Assistance Payments Administration

Plaintiffs-Appellants respectfully urge that the position taken by H.E.W. is correct and consistent with the plain meaning and history of the Social Security Act. H.E.W. issued its Program Instruction to solve the problem the Court now faces.[4] A reversal by this Court should secure much greater consistency among the states in their administration of their AFDC-FC programs.

The state then claims that the statutes challenged by Plaintiffs which engraft the term "unrelated" into the definition of foster family home (Ch. 23 §§2212.05,

---

[4] Illinois is one of the states where instruction from H.E.W. is most needed. In their Motion to Dismiss or Affirm filed in September 1974, Defendants-Appellees took the position that under its present laws, Illinois could, if it wished, make AFDC-FC payments in the full amount of $105.00 to children placed in approved foster homes maintained by their relatives. Ill. Rev. Stats., Ch. 23 §4-1.2 [Text: S 1-12]. This would make the DCFS Regulation [App. 36] which says that there is no statutory authority to make foster care payments to relatives a plain untruth.

2212.17 [App. 21]), and the section of the Child Care Act which allows payment only to *licensed* child care facilities (Ch. 23, § 5005 [App. 24, 27], are naught but licensing provisions and have nothing to do with payment for foster care.

In their affidavit of January 8, 1974 in Support of Motion for Summary Judgment, which was in part stricken by the District Court, one of the Defendants' lawyers stated:

> The Department's general policy of not paying relatives is not based on the Child Care Act of 1969 which established licensing criteria, but on the administrative interpretation of the Department and the United States Department of Health, Education and Welfare that Federal financial participation would not be available under Section 408 (42 USCA § 608 1972) of the Social Security Act to children living with relatives as defined by Section 406(a) of the Social Security Act (42 USCA § 606(a) 1972).
>
> [App. 42]

And Defendants made this same assertion in their Motion to Dismiss or Affirm, at 6.

If the Illinois *statutes* are not the basis for denying Plaintiffs' eligibility (contrary to the District Court's finding, 374 F. Supp. at 1205) then perhaps it is only the state's regulations which are in issue. If the sole basis for the state's denial of payment was its understanding that H.E.W. would deny federal financial participation if the payments were made, then Illinois' policy is based on an error. After the October 25, 1974 Program Instruction, *supra*, no one could misunderstand H.E.W.'s position. To the degree Illinois' scheme was

based on the administrative interpretation of H.E.W., it is now baseless.

C. The legislative history and overall purpose of the Social Security Act make Plaintiffs eligible for full AFDC-FC payments; denial of the payments violates the Act.

The entire history and present administration of Title IV of the Social Security Act, including the more recent federal foster care program, must be considered in light of the overall purpose for which all federal funds under Title IV are appropriated.

The present purpose is declared in Section 401:

> For the purpose of encouraging the *care of dependent children in their own homes or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to *needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, . . .
>
> 42 U.S.C. § 601 [App. 28] (emphasis added)[5]

The original Aid to Dependent Children program was established by Congress in 1935 to provide assistance to

---

[5] For further discussion of the overall purpose of the Social Security Act in relation to the foster care program, see the attached Memorandum of Decision of Chief Judge Fred J. Nichol in *Clampett v. Madigan*, supra, the South Dakota version of the *Youakim* case [Text: S-8 ff, at S-12].

needy children who were living with their parents or certain designated relatives, and who were deprived of parental support for one of three narrowly defined reasons: the death, continued absence from the home, or physical or mental incapacity of a parent. Section 406(a) 42 U.S.C. § 606(a). [Text: S-3].

The policy that requires support of children in the homes of their relatives when they cannot live with their parents, and the purpose to help maintain and strengthen family life and associations was established from the beginning.[6]

The same concern for the sanctity and importance of preserving family ties permeates the history of the Act. Thus in 1961 when Congress recognized the need for a new, separate program to assist a fourth category of children – foster children – the Senate Committee cautioned:

> The foster care provisions in your committee's bill have been designed, insofar as possible, to safeguard the rights of the child and his parents or relatives. No one takes lightly the severance even for a brief period, of the ties between a child and parent, or somebody closely related to him.
>
> Sen. Rep. No. 165, 87th Cong., 1st Sess. 1961 U.S. Cong. & Adm. News V.2.1722.

The policy that children who cannot live with their parents should live with relatives whenever possible and that the Act must be administered to maintain and strengthen family ties is the underlying theme of the entire program of aid to dependent children.[7]

---

[6] See Sen. Rep. No. 628, 74th Cong. 16, 17 and 34-36 (1935).

[7] 42 U.S.C. § § 601, 602(d)(13)(14), 606(d), 625.

In 1956 the policy mandate to place children who could not live with their parents in the homes of their relatives was codified in Section 401. 42 U.S.C. § 601. August 1, 1956 C. 836, Title III, § 312(a), 70 Stat. 848.

In 1962 Congress again declared its concern for the maintenance of family life and the importance of family ties when it changed the beneficiaries of the program from "needy children" to "needy families with children." ADC became AFDC. 42 U.S.C. § § 601, 602(a) ff. July 25, 1962, Pub. L. No. 87-543, Title I, § 104(a)(4), 76 Stat. 185.

The overall purpose of the Social Security Act is to strengthen family life and associations and to provide for care of children by their parents, or if that is not possible, then by their relatives. All state programs which participate in federal funds under Title IV must conform to this purpose.

When it enacted § 408, 42 U.S.C. § 608[7A] in 1961 the Congress clearly created a new category of recipients of a specialized type of assistance. The new foster care program (ADC-FC, later AFDC-FC)

> would allow the states the option of bringing needy dependent children under the federally aided program *where a court of competent jurisdiction finds that the children are not receiving proper care and protection in their own homes* and gives the responsibility to the state agency to place them in foster family homes.
>
> Sen. Rep. No. 165, 87th Cong. 1st Sess., 1961 U.S. Cong. & Adm. News V. 2. (1717). (emphasis added)

[7A] 42 U.S.C. § 608. May 8, 1961, Pub. L. No. 87-31 § 2 75 Stat. 76.

The Committee noted that state foster care programs varied widely and that

> [t]he lack of financial resources for such care has hindered the development of *the most suitable care* for children who have to be cared for outside their own home.
>
> *Id.* at 1721 (emphasis added)

The definition of "foster family home" [Part I-A *supra*] and the provision to allow payment for foster care in the home of "any individual" were set out in Section 408 as it was originally drawn in 1961. When the Senate Committee recognized the need to develop "the most suitable care for children who have to be cared for outside their own homes," they meant to include, and even favor, foster care in the homes of relatives. This conclusion follows in light of:

--the long-standing and overall policy of preference for care in homes of relatives and the importance attached to maintaining family associations, and

--congress' use of the unrestrictive term "any individual" in Section 408.

Proposed in 1962, but not enacted until 1968 was the current definition of child welfare services, which include:

> otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their home in foster family homes or day care or other child care facilities.[8]

[8] 42 U.S.C. § 625 added January 2, 1968 C. 531. Title IV, § 425, Pub. L. No. 90-248, Title II § 240(c) 81 Stat. 914 [App. 28].

Sen. Rep. No. 1589, 87th Cong. 2nd Sess. 1962 U.S. Cong. & Adm. News V.1.1959.

The language is consistent with the plain meaning of the statute and the interpretation of Title IV urged by H.E.W. and the Plaintiffs-Appellants. There is nothing in the legislative history of the 1962 amendments which would authorize the state to limit eligibility as defined in Section 408 of the Act.[9]

The strongest support for the interpretation urged by Plaintiffs and H.E.W. appears in the legislative history of the 1968 amendments. The Committee recognized that there simply was not enough money for the development of quality foster care programs in the states and that the lack of federal revenue sharing would make local courts reluctant to place a child in foster care which was entirely locally funded. Sen. Rep. No. 744, 90th Cong. 1st Sess. 1967 U.S. Code & Adm. News. V. 2.3001-3002. The thrust of the 1968 amendments relating to the AFDC-FC program was to make the program less restrictive and more remunerative. Congress offered the states the incentive of increased federal revenues in order to encourage development of more, and better, foster care programs operated more efficiently and with greater uniformity.

Finally, and most importantly, the Committee specifically acknowledged what the states had long since learned: foster care is more expensive than other forms of AFDC care.[10]

[9] 42 U.S.C. § § 601, 602, ff. Amended January 2, 1968, Pub. L. 90-248. Title II. § 201 ff., 81 Stat. 877 ff.

[10] Cf. *Ramos v. Montgomery* 313 F. Supp. 1179 (S.D. Cal. 1970), aff'd 400 U.S. 1003, 91 S. Ct. 572 (1971).

Under the committee bill, *Federal funds will be available on a more liberal basis than for the basic program out of a recognition that foster family care is more costly than care in the child's home.* Effective July 1, 1969 state plans would have to provide for foster care under these terms. Federal sharing will be possible in payments up to $100 a month (on an average basis) for children in foster care. The committee believes that these liberalizations will be of material assistance to States and localities *and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government.*

Id. at 3001, 3002. (emphasis added)

The reasons for the committee's comments are obvious. Relatives, who have no legal duty to support their kin, and who would not undertake to subsidize the state's obligation, refused or were unable to provide the expensive foster care at the regular, lower, AFDC rate. Congress recognized this, and advised the states that children in approved foster homes maintained by their relatives were, like all other foster children, expensive to care for, and eligible for the full AFDC-FC payments.

The Act's history and purpose are to maintain and strengthen family ties. There is paramount legislative interest in obtaining the best possible environment for the child, whose needs are superior to any state financial interest.[11] The plain words of § 408 provide for full foster care payments to children in the home of "any individual." Plaintiffs-Appellants maintain only one conclusion is possible. The Illinois foster care

[11]This Court expressed a similar view in *King v. Smith* 392 U.S. 309 at 325, 88 S. Ct. 2128 (1970).

payment scheme violates the Social Security Act and Regulations and the Supremacy Clause. By the clear words of the statute Plaintiffs are eligible for full foster care payments. The program administrators at H.E.W. interpret the Social Security Act according to its plain meaning. They have instructed all the states to apply the law as it is written and to pay full AFDC-FC payments to foster children placed in the approved home of any individual, including a relative of the foster child.

Nothing in the legislative history authorizes the states to limit eligibility. An examination of the development of the law and of the committee arguments indicates the opposite congressional intent.

Illinois' attempt to engraft an additional eligibility condition onto a clear federal definition must fail. Its policy violates the plain meaning and overall purpose of the Social Security Act. Families are separated, not strengthened. The scheme imposes an economic burden on relatives who might otherwise be willing to provide foster care. In clear violation of the numerous pronouncements by this Court, the Illinois scheme assumes income and contributions will be forthcoming from persons who have no legal duty to contribute. Two of the three federal district courts that considered the question here presented found the state schemes violated the Social Security Act and the Supremacy Clause. The Northern Illinois District Court erred. Its decision must be reversed. The Illinois laws and regulations must be revised to conform to the federal law.

II.

THE ILLINOIS FOSTER PAYMENT SCHEME CREATES TWO CLASSES OF PERSONS FOR FOSTER CARE BENEFITS: FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE STRANGERS AND FOSTER CHILDREN LIVING WITH FOSTER PARENTS WHO ARE RELATED TO THEM. FULL FOSTER CARE PAYMENTS ARE MADE TO THE FORMER CLASS AND NONE ARE MADE TO THE LATTER. THIS CLASSIFICATION VIOLATES THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND SPECIFICALLY THE EQUAL PROTECTION CLAUSE.

Introduction

The Fourteenth Amendment holds that no state may deny its citizens equal protection of the laws. The Illinois foster care payment scheme violates equal protection because it results in invidious discrimination against a sub-group of the state's foster children.

Full foster care payments are made to all Illinois foster children except those who are in the best placement: approved foster homes maintained by their relatives. These latter children receive no AFDC-FC payments. They are cut off for the sole reason the placement is deemed best: because of the family ties between the child and his foster parent.

The discrimination persists even though:

-- no foster parents–related or unrelated–have any legal duty to support their foster children. Ill. Rev. Stats. Ch. 23, § 2-11(1971) [Supp. S-1].

-- the state has the identical duty to support each of its wards and cannot look to anyone, including non-legally responsible relatives, to subsidize its obligation; and

-- the children incur the same expenses whether their foster home is maintained by strangers or relatives.

The Court should analyze the equal protection claim of Plaintiffs-Appellants by applying either of two tests: A. As it has done in several recent cases which considered challenges to violations of important personal rights, the Court should closely examine and balance: 1) the character of the classification; 2) the nature of the personal interest infringed, and 3) the nature of government interest advanced.[12] B. Alternatively, the Court should apply its minimum scrutiny-mere rationality test, the second level of the traditional two-tier approach to equal protection.

Application of either test will result in a finding that the Illinois foster care scheme invidiously discriminates against Plaintiffs-Appellants, that the discrimination bears no rational relationship to any legitimate state interest, and that the scheme violates Plaintiffs' right to equal protection of law. Neither the possibility of smaller payments under the regular AFDC program, nor the slight possibility of larger payments under an arbitrary setup of "exceptions to policy" payments can save the unconstitutional Illinois scheme.

---

[12]For a recent description of this approach see:

Gunther, Foreword: In Search of an Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

A. This Court should follow its recent jurisprudence and give close scrutiny to: 1) the character of the classification; 2) the nature of the personal interest infringed, and 3) the nature of the state interest advanced by Illinois' discriminatory foster care payment scheme. On balance, it is unconstitutional.

1. Illinois' denial of AFDC-FC payments to children who are placed in approved foster homes maintained by their relatives results in invidious discrimination against a class of children.

The sub-class of foster children represented by Plaintiffs has the characteristics of a suspect class. The discrimination results from the following facts: First, for whatever tragic reasons the parents of these children rejected, neglected or failed them. Second, the juvenile court adjudicated them, labeled them, and made the state their parent. A certain opprobrium inevitably attaches to the children as a result of this process. Third, the state picked a state-approved foster home for them. The children had no choice about any of this.

The law mandates that the children be placed in foster homes maintained by their relatives if possible. They have no choice about that either. But most children prefer and need a strong family relationship and identity. The children, parentless, believe themselves fortunate that they might move in with other relatives with whom they have immutable lifelong relationships.

Then the state tells the children and the potential foster parents about the price they must pay for their status as relatives. Illinois pays a premium to keep

children with strangers. And they have no choice about that either.

These children warrant the Court's close attention and considerable protection. The politically powerless sub-class of children represented by the Plaintiffs is much like the class of illegitimate children. The discrimination against them is equally illogical, unjust and invidious. *Weber, supra,* at 175. The Court should give close scrutiny to their claim.

The Court has given close scrutiny to statutes which discriminate against illegitimate children. These children have not been declared to be members of a suspect class, but the Court nonetheless affords them close attention and considerable protection. See *Levy v. Louisiana,* 391 U.S. 68, 88 S. Ct. 1509 (1968); *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 92 S. Ct. 1400 (1972); *Griffin v. Richardson,* 346 F. Supp. 1226 (D. Md. 1962), aff'd 409 U.S. 1069, 93 S. Ct. 689, (1972); *Davis v. Richardson,* 342 F. Supp. 588 (D. Conn. 1972), aff'd 409 U.S. 1069, 93 S. Ct. 678 (1972); *Gomez v. Perez,* 409 U.S. 535, 94 S. Ct. 872 (1973); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619, 93 S. Ct. 1700 (1973); *Jiminez v. Weinberger,* 417 U.S. 628, 94 S. Ct. 2496 (1974).

2. Illinois' denial of AFDC-FC payments to children who are placed in approved foster homes maintained by their relatives infringes an interest and violates a right that is basically and fundamentally important: the right to preserve and strengthen family associations.

The interest of the Plaintiff children that the discriminatory Illinois foster care payment scheme

violates is one of basic and fundamental importance. While this Court has not declared it to be a traditional "fundamental interest" it has recognized its importance and given close scrutiny to statutes which would infringe upon it. *Levy v. Louisiana, supra.*

In *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208 (1972) the Court catalogued the cases upholding the right of family association—a right so basic that the state's contrary fiscal and administrative interests must fall before it:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson,* 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra,* at 541, and the Ninth Amendment, *Griswold v. Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> *Stanley* at 651.

In *Levy* and *Stanley* the Court recognized and deferred to the warm, deep and enduring relationship between parent and child. In *Youakim* the relationship

between brother and sister is similarly warm, deep and enduring, particularly because the parents are tragically absent. This Court should give close scrutiny to state statutes whose rhetoric encourages the relationship, but whose economics destroy it.

3. On balance with the character of the discrimination and the importance of the personal rights infringed, any state interest purportedly served by Illinois' denial of foster care payments is not sufficient to justify the scheme.

Traditionally, in cases where there has been no suspect class or fundamental interest in play, the Court has examined the state's interest by application of the lenient "mere rationality—minimum scrutiny" test of *Morey v. Doud,* 354 U.S. 457, 77 S. Ct. 1344 (1953):

> When a classification in a law such as this is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

But in recent years, particularly in cases concerning important personal rights, the Court has given much closer scrutiny to the state interest purportedly advanced. The Court now requires more than the first speculated, then presumed, idea that the state legislature must have had some good in mind when it enacted the discriminatory statute. *Weinberger v. Weisenfeld,* ____ U.S. ____, 95 S. Ct. 1225 at 1233 and note 16 (1975). It now may require that the interest advanced by the classification be articulated and factually based, *Kahn v. Shevin* 416 U.S. 351, 94

S. Ct. 1734 (1974), and in fact bear a fair and substantial relationship to an overall and a legitimate state purpose. *Weber v. Aetna Life and Casualty Co.* 406 U.S. 164, 92 S. Ct. 1400 (1972); *Jiminez v. Weinberger, supra.*

Any state interest which does not meet the above criteria must be of such little weight that when balanced with the fundamentally important personal rights infringed the state interest must fail, and the Court must find the law to be unconstitutional.

The District Court mentioned three state interests which might be advanced by the denial of AFDC-FC payments. One is the

> "motivation to provide as many foster homes as possible be restricting the distribution of available funds only to persons who would otherwise have had no particular reason or incentive for becoming foster parents rather than allocating the funds to *all persons* who become foster parents and thereby reducing the amount received by each . . .
>
> 374 F. Supp. at 1208 [App. 56]. (emphasis added)

The Court conceded that this interest might have the effect of keeping families separate, but that nonetheless the overall purpose of the protection and care of children generally would be served. 374 F. Supp. at 1209 note 6. [App. 59].

A state interest was thus articulated and noted by the District Court. But the interest was speculative. The lower court erred in its failure to require a factual basis and it erred in its application of the mere rationality test. The District Court misconstrued the overall legitimate state interest supposedly advanced.

In the same footnote the District Court inferred that the state's interest in strengthening the family unit is of lesser importance than the care of children generally. This is a gross misinterpretation of the overall *state* purpose. The state welfare statutes involved in this case, all of which must conform to the federal law and its overall purpose, consistently mandate that strengthening the family unit is the central and overall purpose of the state's welfare system.[13]

The state interest purportedly advanced by the discrimination against Plaintiffs are not sufficiently legitimate to justify it. The statutes that dictate the cutoff of AFDC-FC payments and the purpose they allegedly serve do not bear a fair and substantial relationship to, nor do they significantly advance, the overriding state purpose of strengthening and rendering service to *families.*

The government interests proposed in *Youakim* are no more weighty than those found insufficient in *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251 (1971); *Jiminez v. Weinberger, supra; Weinberger v. Weisenfeld, supra;*

---

[13]Cf. Ill. Rev. Stats., Ch. 23 § 5005 ¶¶3, 6 (1971) [App. 23, 25] Ill. Rev. Stats., Ch. 37 § 701-2(1) (1971) [App. 30]. DCFS Regulation [App. 34].

The Court's observation that the change Plaintiffs seek would interfere with the state's adoption system is likewise speculative and not supported by the record. 374 F. Supp. at 1209 note 5. Another state interest was suggested by the state's lawyers: if the Defendants did not cut off the payments, Illinois would lose its participation in the federal funding. Thus the policy was dictated by H.E.W.'s administrative interpretations of the Social Security Act. This reason has simply disappeared. Cf. discussion in Part I-B and note 4, *supra.*

Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821 (1973); and other illegitimacy cases set out in Part II-A-1 supra.

Should this Court balance the interests and give close scrutiny to the invidious classification, it must then conclude that the Illinois scheme violates equal protection of law.

B. The Illinois foster care payment scheme which denies AFDC-FC payments to children who are in the best placement, in approved foster homes maintained by their relatives, is not rationally related to any legitimate state interest.

For the reasons set forth in Part II-A-3, *supra*, Plaintiffs-Appellants suggest that no legitimate state interest was ever articulated by the District Court, and that the state statutes before the court indicate that strengthening and rendering services to *families* is the only and overriding legitimate state interest in play.

The present Illinois foster care scheme may, as the District Court recognized, keep some children from living with their relatives. 374 F. Supp. at 1208 [App. 56]. And there was no satisfactory response to the Plaintiffs' assertion that the state had breached its duty to treat all its wards equally.

> Plaintiffs argue that, by providing for state aid only to foster parents who are unrelated to the child and denying it to others, the state has breached its duty to provide equally for all

> dependent children and has in fact contributed to the breakup of family homes. They assert that since related foster parents have the same need for state subsidies to provide adequately for their foster children as do unrelated foster parents, there is no basis for the distinction. Although this statement of the state's duty may indeed be correct, plaintiffs have failed to recognize both the purpose for which the payments are made and the test [i.e., of *Morey v. Doud* and *Lindsley v. National Carbonic Gas Co., supra.*] to be employed in examining the classification of the statute.
>
> at 1208 [App. 55-56].

As it misconstrued the overall purpose of the Illinois welfare and family services laws, the District Court could not correctly apply the minimum scrutiny test. Its decision should be reversed.

This Court's recent decision in *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973), aff'd 416 U.S. 901, 94 S. Ct. 1604 (1974), may dispose of the equal protection claim in *Youakim*. The minor plaintiffs in that case challenged a Pennsylvania welfare regulation which cut off general assistance grants to children who were living with unrelated substitute parents on the grounds that the regulation violated equal protection.

The cutoff was automatic: the sole basis was the child's status as a nonrelative to the substitute parent. As the general assistance payments were not federally subsidized, there was no question of interpretation of the Social Security Act and the three judge court was able to reach the constitutional question at the outset.

The *Williams* case is, in effect, the mirror image of the *Youakim* case absent the supremacy claim. In

Williams the children were dropped from general assistance for the sole reason that they were not related to the substitute parents with whom they had lived for several years and with whom they had a *de facto* family relationship. In *Youakim* the children were cut off from AFDC-FC for the sole reason that they were related to their foster parents—the very reason they were placed with them. As in *Youakim*, there was in the *Williams* case theoretically another assistance program through which the plaintiff children could have received aid. But as in *Youakim*, the mechanics of securing it were difficult, burdensome and risky.

In his majority opinion, Judge Knox applied the traditional equal protection test, and held that the classification was irrational, invidious, and in violation of equal protection. 366 F. Supp. at 546. The District Court found that the state interest purportedly advanced by the regulation, i.e., uniformity and administrative convenience in caring for all orphans through the Child Welfare Agency, was in no way rationally related to the overall state legislative purposes of providing assistance to needy persons. This Court affirmed without opinion. 416 U.S. 901, 94 S. Ct. 1604 (1974).

Similarly in *Youakim* this Court should find that the speculative interest allegedly advanced, the development of more foster homes, is in no way rationally related to the overall state legislative purposes of providing family and social welfare services, and strengthening the family ties of the state's wards.

Illinois' denial of AFDC-FC payments to its wards who are placed in the best possible placement, an approved foster home maintained by relatives of the

ward, cannot stand up under any test of equal protection. This Court should declare the scheme unconstitutional.

CONCLUSION

For the foregoing reasons Plaintiffs-Appellants respectfully ask that the District Court's summary judgment for Defendants be reversed with directions to enter summary judgment for Plaintiffs, or in the alternative, to set the matter for trial.

Respectfully submitted,

PATRICK A. KEENAN
DePaul Law Clinic
DePaul University College of Law
23 East Jackson Boulevard
Chicago, Illinois 60604
(312) 321-7751

Attorney for Appellants

Of Counsel:

Jane Shay Lynch
DePaul University College of Law

Date: May 31, 1975

Plaintiffs and their counsel gratefully acknowledge the advice and assistance of Ronald S. Barliant, Melvin B. Goldberg, Michael J. Lefkow, Nan M. Nolan, Gail M. Rangel, Richard C. Turkington and particularly James P. Weill.

SUPPLEMENT

ILLINOIS REVISED STATUTES

Chapter 23

Charities and Public Welfare

§ 2–11. "Legally Responsible Relative"

"Legally Responsible Relative": the spouse of an applicant or recipient; the parent or parents of a child who is under age 21.

The support obligation of other persons defined as "legally responsible relatives" in this Section prior to the effective date of the Amendatory Act of 1967 and the Amendatory Act of 1969 for aid extended to their dependents prior to such effective date, shall remain unimpaired.

Amended by P.A. 76–1765, § 1, eff. Oct. 6, 1969.

§ 4–1.2 Living Arrangements—Parents—Relatives—Foster Care

The child or children must (1) be living with his or their father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, or other relative approved by the Illinois Department, in a place of residence maintained by one or more of such relatives as his or their own home, or (2) have been (a) removed from the home of the parents or other relatives by judicial order under the "Juvenile Court Act", approved August 5, 1965, as amended,[1] (b) placed under the guardianship of a county superintendent of public aid or the principal administrative officer in the Division of Child Welfare of the Department of Children and Family Services, and (c) under such guardianship, or other guardianship authorized prior to the effective date of this 1969 Amendatory Act, placed in a foster family home or child care institution licensed pursuant to the "Child Care Act", approved July 10, 1957, as amended,[2] or approved by that Department as meeting standards established for licensing under that Act. A child so placed in foster care who was not receiving aid under this Article in or for the month in which the court proceedings leading to that placement were initiated may qualify only if he lived in the home of his parents or other relatives at the time the proceedings were initiated, or within 6 months prior to the month of initiation, and would have received aid in and for that month if applicaton had been made therefor.

The conditions of qualification herein specified shall not prejudice aid granted under this Code for foster care prior to the effective date of this 1969 Amendatory Act.

Amended by P.A. 76–1199, § 1, eff. Sept. 4, 1969.

[1] Chapter 37, § 701—1 et seq.
[2] Chapter 23, § 2301 et seq., repealed.

UNITED STATES CODE

Title 42

The Public Health and Welfare

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must . . .

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title; . . .

§ 603. Payment to States; computation of amounts; Federal share of assistance payments; social and supportive services; appropriation; family planning services and supplies; reduction of amounts

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to section 1320b of this title) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)— . . .

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32

multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month;

§ 606. Definitions

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

§ 606. Definitions [Continued]

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such require-

ments except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

CODE OF FEDERAL REGULATIONS

Title 45—Public Welfare

Chapter II—Social and Rehabilitation Service (Assistance)

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Sec.

233.10 General provisions regarding coverage and eligibility.
233.11 Special provisions applicable to the work incentive program; State plan requirements.
233.20 Need and amount of assistance.
233.30 Age.
233.40 Residence.
233.50 Citizenship and alienage.
233.60 Institutional status.
233.70 Blindness.
233.80 Disability.
233.90 Factors specific to AFDC.
233.100 Dependent children of unemployed fathers.
233.110 AFDC foster care.
233.120 Emergency assistance to needy families with children.
233.140 Expiration of community work and training program.
233.145 Expiration of medical assistance programs under titles I, IV-A, X, XIV and XVI of the Social Security Act.

AUTHORITY: The provisions of this Part 233 issued under sec. 1102, 49 Stat. 647; 42 U.S.C. 1302, unless otherwise noted.

§ 233.10 General provisions regarding coverage and eligibility.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage;

(B) Impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act.

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the State.

(v) A plan under title XVI must have the same eligibility conditions and other requirements for the aged, blind, and disabled, except as otherwise specifically required or permitted by the Act.

(vi) Eligibility conditions or agency procedures or methods must not preclude the opportunity for an individual to apply and obtain a determination of eligibility or ineligibility.

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

(2) Provide that the State agency will establish methods for identifying the expenditures for assistance for any groups included in the plan for whom Federal financial participation in assistance may not be claimed.

BEST COPY AVAILABLE

(3) In addition, a State plan under title IV-A, X, XIV, or XVI of the Act, must: Provided that no aid or assistance will be provided under the plan to an individual with respect to a period for which he is receiving aid or assistance under a State plan approved under any other of such titles or under title I of the Act.

(b) *Federal financial participation.* (1) The provisions which govern Federal financial participation in assistance payments are set forth in the Social Security Act, throughout this chapter, and in other policy issuances of the Secretary. Where indicated, State plan provisions are prerequisite to Federal financial participation with respect to the applicable group and payments. State plan provisions on need, the amount of assistance, and eligibility determine the limits of Federal financial participation. Federal financial participation is excluded from assistance payments in which the State refuses to participate because of the failure of a local authority to apply such State plan provisions.

(2) The following is a summary statement regarding the groups for whom Federal financial participation is available. (More detailed information is given elsewhere.)

(i) OAA—for needy individuals under the plan who are 65 years of age or older.

(ii) AFDC—for:

(*a*) Needy children under the plan who are:

(*1*) Under the age of 18, or under 21 if regularly attending a school, college, or university, or regularly attending a course of vocational or technical training;

(2) Deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or unemployment of a father; and

(3) Living in the home of a parent or of certain relatives specified in the Act, or in foster care under certain conditions.

(*b*) The parent or other caretaker relative of a dependent child and, in certain situations, the parent's spouse.

(iii) AB—for needy individuals under the plan who are blind.

(iv) APTD—for needy individuals under the plan who are 18 years of age or older and permanently and totally disabled.

(v) AABD—for needy individuals under the plan who are aged, blind, or 18 years of age or older and permanently and totally disabled.

(3) Federal financial participation is available for assistance payments for the entire month if for any portion of the month the individual met all of the eligibility conditions imposed by Federal requirements.

(4) Federal financial participation is available in assistance payments which are continued, in accordance with the State plan, for a temporary period during which the effects of an eligibility condition are being overcome, e.g., blindness in AB, disability in APTD, physical or mental incapacity, continued absence of a parent, or unemployment of a father in AFDC.

[36 F.R. 3866, Feb. 27, 1971, as amended at 37 F.R. 12701, June 29, 1972; 38 F.R. 8744, Apr. 6, 1973; 38 F.R. 26578, Sept. 20, 1973; 39 F.R. 26912, July 24, 1974]

BEST COPY AVAILABLE

§ 233.110 AFDC foster care.

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act must:

(1) Provide that aid will be given in the form of foster care for each otherwise eligible child:

(i) Who was removed after April 30, 1961, from the home of a relative specified in the AFDC plan, as a result of a judicial determination that continuance in the home of the relative would be contrary to his welfare, for any reason, and who has been placed in foster care as a result of such determination; and

(ii) (*a*) Who, in or for the month in which that court action was initiated, was receiving AFDC, or would have received AFDC if application had been made, or

(*b*) Who lived with a relative specified in the AFDC plan within 6 months prior to the month in which that court action was initiated, and who would have received AFDC in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made for him; and

(iii) Whose placement and care are the responsibility of the State agency administering or supervising the administration of the AFDC plan, or, if the State so elects, are the responsibility of any other public agency, or type or types of public agencies specified in the plan, with whom the State agency has a currently effective agreement that provides for development of a plan satisfactory to the State agency for AFDC-FC children in accordance with subparagraph (2) of this paragraph and that contains other provisions necessary to achieve the objectives of the State's AFDC plan.

(2) Provide for development of a plan for each child described in subparagraph (1) of this paragraph, so that:

(i) He will be placed in a foster family home or a child care institution in accordance with his needs;

(ii) His need for and the appropriateness of his care and services in such placement will be reviewed not less frequently than every 6 months;

(iii) Services will be provided to improve the conditions in the home from which he was removed or to make possible his placement in the home of another relative under the State's AFDC plan. (See § 220.19 of this chapter.)

(3) Provide that maximum use will be made of the services of employees of the State public welfare agency responsible for the plan for child-welfare services under title IV-B of the Act or of any local agency participating in the administration of such plan.

(4) Specify:

(i) In what types of child care institutions (private nonprofit, or public, or both), in addition to foster family homes, placement will be made; and

(ii) Whether payments will be made to foster homes and institutions only or also to other agencies.

(5) Provide that there will be specific criteria for determining the amount of payment for foster care in foster family homes and in child care institutions. In establishing rates of payment to institutions, only those items included for care in foster family homes will be included, and overhead costs of the institution will be excluded.

Under the requirements of this paragraph, provision must be made for both foster family care and institutional care in accordance with the individual child's needs; public institutions may be used, without Federal financial participation, to discharge the institutional obligation in whole or in part; and the use of institutions outside the State will also meet the requirement for the provision of institutional care.

(b) *Federal financial participation.* (1) Federal financial participation is available, effective January 1, 1968, in AFDC-FC payments not to exceed an average of $100 per month per recipient, made on behalf of children as specified

in section 403 of the Social Security Act, who are included in the approved State AFDC plan and who are placed in a foster family home, or nonprofit private child-care institution, licensed or approved by the agency which is responsible for licensing or approval of such facilities in the State where it is situated. The maximum of $100 average per month per recipient may be disregarded when the State claims Federal funds under the provisions of section 1118 of the Act.

(2) Federal financial participation is available in AFDC-FC payments made to an individual providing care in a foster family home, to a private nonprofit child care institution, or to a cooperating public or nonprofit private child placement or child-care agency.

[36 F.R. 3869, Feb. 27, 1971]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CIV 73-4018

Marie Clampett, individually and on behalf of her foster children. Joseph Packard, Jr., Marcus Packard, and Cynthia Packard, and Evelyn Staub, individually and on behalf of her foster children, Doyle Medicine Eagle and Timothy Medicine Eagle, and on behalf of themselves and all others similarly situated,

Plaintiffs

-vs-

John E. Madigan, individually and in his capacity as Director, State Department of Public Welfare, and his agents, representatives and assigns of the State Department of Public Welfare,

Defendants

MEMORANDUM OF DECISION

Mr. Stephen L. Pevar, of Rosebud, South Dakota appeared in behalf of the plaintiffs;

and

Mr. R.K. Krogstad, Special Assistant Attorney General of Public Welfare, of Pierre, South Dakota, appeared in behalf of the defendants.

This is a civil rights suit instituted pursuant to 42 U.S.C. Sec. 1983, seeking declaratory and injunctive relief authorized by 28 U.S.C. Secs. 2201, 2202, and by Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs also seek to maintain the suit as a class action as provided by Fed. R. Civ. P. 23(a), (b)(2) & (b)(3). Jurisdiction is conferred upon this court by 28 U.S.C. Sec. 1343(3)&(4).

The plaintiffs are two similarly situated mothers who are related to the foster children residing in their homes. Marie Clampett and her husband reside in Lake Andes, South Dakota, with their five children and three foster children. The three foster children were placed there by the South Dakota Department of Public Welfare (DPW). Authority was given to make such a placement on December 1, 1972, by an order of the Rosebud Sioux Tribal Court. Public assistance payments of $144 per month were granted plaintiff Clampett upon her application for Aid to Dependent Children (ADC). Marie Clampett is the paternal aunt of the foster children, Joseph, Marcus and Cynthia Packard.

On November 1, 1972, at the conclusion of a foster home study conducted by the DPW, the Clampett home was recommended for licensing as a foster care home. *See* SDCL Secs. 26-6-9 to 26-6-11 (1967). On November 27, 1972, plaintiff Clampett requested that her foster children be removed from ADC and that she

be paid foster care payments for their care. That request was denied. At her fair hearing appeal the denial was affirmed (1) because "state foster care funds are not used to pay a relative," and (2) because six is the maximum number of children permitted to reside in a licensed foster care home, including the children of the foster parents. The Clampett home exceeded this limitation by two, precluding eligibility for foster care payments. Plaintiff Clampett has continued to receive assistance through the ADC program.

Evelyn Staub and her husband reside in Winner, South Dakota, with two foster children placed there by the DPW. Subsequent to a declaration that the two children were dependent and wards of the State, a court order issued by the Tenth Judicial Circuit of the State of South Dakota on October 1, 1972, gave the DPW custody of Doyle and Timothy Medicine Eagle. Mrs. Staub is the great aunt of these foster children. Plaintiff Staub formally requested foster care payments on February 14, 1973. Based upon the policy established by the South Dakota Public Welfare Commission, which prohibits payment of foster care funds to relatives within a certain degree, Mrs. Staub's request was denied.

Jointly, the two plaintiffs, on their own behalf and on behalf of all others similarly situated, initiated this civil rights action to enforce their Constitutional rights of due process and equal protection of the laws, as provided by the Fourteenth Amendment, and to correct an alleged deprivation of their rights granted under the Social Security Act of 1935. 42 U.S.C. Sec. 301 *et seq.* Their requests for a temporary restraining order and a preliminary injunction have been denied. A hearing for

a permanent injunction was held and the plaintiffs submitted a brief. The defendants waived filing a brief, preferring to rely upon their oral argument and a reproduced copy of that portion of the Manual of the South Dakota State Department of Public Welfare regulations pertaining to foster care to explain their position.

The State of South Dakota has a state-wide foster care program. That program, as evidenced by the Manual of the South Dakota State Department of Public Welfare (hereinafter "Manual") is financed by a number of separate and independent sources, each containing their own prerequisites which must be complied with before their funds are available. These various sources of revenue, which provide the support for foster children, are all administered locally by the DPW and subject to its regulations. *See* Manual of the South Dakota State Department of Public Welfare Part IV-5F. The State's funds (State Foster Care) are used to supplement these diverse sources of funding. One such source of funding the State may look to for support of a dependent child is ADC Foster Care (Federal Foster Care), representing the federal contribution to this State program. However, to be eligible for Federal Foster Care the foster child must comply with that program's listed requirements. Manual at IV-5F-12 to 14. The State Foster Care funds are also subject to certain other limitations.

The State regulation in issue provides that "State foster care funds are not used to pay a relative." Manual at IV-5F-14. A "relative" under these circumstances is a:

a) father; mother; grandfather; grandmother; brother; sister; stepfather; stepmother; stepbrother; stepsister; uncle; aunt; first cousin; nephew or niece; including those of half-blood.

b) relatives of the preceding generation denoted by prefixes of grand or great, as specified in subparagraph (a).

c) * * *

d) * * *

See Manual at IV-5F-13 & 14.

It is this State administered program, with its accompanying State regulations, which has come under attack by the plaintiffs.

The plaintiffs contend that they are being denied the economic advantages of foster care payments because they are related to the foster children placed in their homes. They reason that a system of aid which allows more money for the placement of foster children in entirely strange homes, rather than with relatives, tends to economically induce the placing of dependent children in unrelated foster homes and, consequently, denies the child the benefit of social and psychological ties already present within the existing family structure. Currently, the foster children in question receive approximately $38 per month on ADC. If they were found eligible for foster care payments under the State's regulations, plaintiffs would receive $65 per month, with an additional allowance for clothing. Manual at IV-5F-15.

The plaintiffs assert in their amended complaint that the exclusion of relatives from the foster care program was established by the South Dakota Public Welfare Commission and is in violation of the Social Security

Act of 1935 because: (1) it discourages the maintenance of a family life between dependent children and related foster parents contrary to the stated purpose of the Social Security Act, 42 U.S.C. Sec. 601; and (2) Title IV-5F of the DPW's Manual violates the Social Security Act because its regulations do not determine need and the amounts of assistance for *all* applicants on an objective and equitable basis as demanded by the United States Department of Health, Education and Welfare's (HEW) regulations. 45 C.F.R. Sec. 233.20(a)(1).

I am persuaded by the plaintiffs' arguments and agree with their contentions. In addition, I find that the most efficient method for correcting the state-wide application of this regulation is to permit the plaintiffs to proceed as a class pursuant to Fed.R.Civ.P. 23(a), (b)(2). The plaintiffs are representative of that class of people who, as relatives of foster children not legally obligated for such children's support, are being denied foster care assistance by the defendants as directed by the DPW's regulation. Manual at IV-5F-14.

The State of South Dakota has chosen to participate in the provisions of the Social Security Act of 1935, 42 U.S.C. Sec. 301 *et seq.* States desiring the advantages of the substantial federal funds available in administering categorical assistance programs must conform with the requirements of the Social Security Act and with the rules and regulations promulgated by HEW. King v. Smith, 392 U.S. 309, 317, n.34, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). South Dakota has chosen to participate in this federal program and has provided for receipt of the federal monies disbursed thereunder. SDCL 26-4-10 (Supp. 1973).

That portion of the Social Security Act of immediate concern to these plaintiffs is the part authorizing Aid to Families With Dependent Children (AFDC), 42 U.S.C. Secs. 601 *et seq.*, denominated Aid to Dependent Children (ADC) under South Dakota law. SDCL Chapter 28-7 (1967).

Congress expressed its purpose for enacting the AFDC program at 42 U.S.C. Sec. 601.

> For the purpose of encouraging the care of dependent children in their own homes *or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, . . . , to needy dependent children and the parents *or relatives* with whom they are living to help maintain and strengthen family life and to help such parents *or relatives* to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, ... (emphasis added.)

This purpose has been defeated by the provisions of Title IV-5F of the DPW's Manual. Keeping in mind the economic realities of raising foster children, the South Dakota regulations discourage relatives from opening their homes to related dependent children by refusing to pay related foster parents the same amounts paid to unrelated foster parents. The State has determined that $65 per month, plus a clothing allowance, is necessary to adequately support a foster child. Manual at IV-5F-15. Nevertheless, under a regulation promulgated by the Public Welfare Commission, if the foster home is that of a relative, foster care funds are denied to those substitute parents and other assistance must be sought. This pecuniary distinction is imposed upon related

foster parents even though they are not legally obligated to support the dependent child prior to placement, SDCL Chapter 25-7, as amended, and in spite of the well-recognized fact that "it costs more to support a child in a foster home than in his own home." Ramos v. Montgomery, 313 F.Supp. 1179, 1182 (S.D.Cal. 1970), *aff'd.* [illegible] 400 U.S. 1003 (1970); *see also* Senate Report No. 744, 2 U.S. Code Cong. & Admin. News 2834, 3001 (1967). The State, once having determined that a foster child requires $65 per month for adequate support, "may not assume that a (welfare) recipient's relatives, not legally responsible for his support, will charge less than other persons providing (similar care)." Harotti v. White, 342 F.Supp. 823, 826 (D.Conn. 1972).

The plaintiffs' second contention, establishing a conflict between South Dakota's regulatory scheme and the HEW regulations promulgated pursuant to the Social Security Act, pertains to the requirements for State plans receiving federal financial participation. In particular, 45 C.F.R. Sec. 233.20 directs "that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis . . . ." The defendants did not address themselves to this specific issue and, in any event, this court feels their argument would be frivolous in light of the well-reasoned opinions cited by plaintiffs in their brief.

The defendants have sought, generally, to justify the foster care payment differential by pointing out that their definition of "foster care" calls for a "social service which provides substitute care for a child for a planned period outside his own *or a relative's home* when his own family cannot care for him for a temporary or extended period." (emphasis added)

Manual at IV-5F-1. Thus, as I interpret the defendant's argument, by definition the relatives of dependent children, children who have otherwise qualified for South Dakota's foster care program, are precluded that financial assistance found necessary to adequately support a foster child solely because of this familial tie; a kinship which under South Dakota law incurs no legal obligation to support and care for those dependent children until placed there by the DPW. This argument is unpersuasive and fails to justify the State's discrimination.

This court finds that a conflict exists between the stated purpose of the Social Security Act of 1935 along with the regulations promulgated thereunder, and the South Dakota foster care regulations. The discrimination in payments between the two classes of otherwise similarly situated foster parents discourages the rehabilitation of a child's family life with relatives, and to this extent the State welfare regulations are inconsistent with the Social Security Act. Therefore, this court finds for the plaintiffs and enjoins the defendants from denying foster care payments to otherwise qualified applicants solely because the foster parent is related within a certain degree to the foster child.

Plaintiff Marie Clampett, under the facts of this decision, would be eligible for foster care payments for one of her foster children. Plaintiff Evelyn Staub is eligible for foster care for both of her foster children. Plaintiffs will submit an order in conformity with this memorandum decision.

Done and entered at Sioux Falls, South Dakota, this 24th day of May, 1973.

BY THE COURT:

FRED J. NICKOL
Chief Judge